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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

A.V. COSTANTINI,
dba UNITED TRAVEL SERVICE,
dba WARDS TRAVEL SERVICE,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A.V. COSTANTINI
565 John Daly Blvd.
Daly City, Ca 94015
(415) 991-4907

In Propria Persona

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board erred in not requiring compliance with its previously issued orders.

2. Whether the Civil Aeronautics Board erred in not protecting the public interest.

3. Whether the Civil Aeronautics Board erred in allowing an airline to file false statements.

4. Whether the Civil Aeronautics Board erred in not requiring compliance with Board's Rules of Practice.

5. Whether the Civil Aeronautics Board erred in not providing a hearing to resolve disputed issues.

6. Whether the Civil Aeronautics Board erred in issuing an order based upon findings without support in the evidence.

7. Whether the Court of Appeals erred in overlooking the facts and applicable law, and failed to provide a trial de novo.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A.V. Costantini, complainant and petitioner in the proceedings below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

1 Order of the United States Court of Appeals for the Ninth Circuit dated May 25, 1982 denying Petitioner's Motion for Rehearing (Appendix at B1).

2. Order of the United States Court of Appeals for the Ninth Circuit dated April 7, 1982 affirming the dismissal by the Civil Aeronautics Board of three com - plaints filed by Petitioner. 679 F.2d (table) 896 (Appendix at A1).

3. Order No. 80-11-10 of the Civil Aeronautics Board adopted November 3, 1980 affirming the dismissal by the Civil Aeronautics Board's Director of Bureau of Consumer Protection of three complaints filed by Petitioner (Appendix at C1).

4. Order No. 80-6-21 of the Civil Aeronautics Board issued June 4, 1980 by the Director of the Civil Aeronautics Board's Bureau of Consumer Protection (Appendix at D1).

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1982 (Appendix at A1). A timely petition for rehearing was denied on May 25, 1982 (Appendix at B1). This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

5 U.S.C. Section 554 (Appendix at E1)

5 U.S.C. Section 706 (Appendix at F1)

49 U.S.C. Section 1302 (Appendix at G1)

49 U.S.C. Section 1472 (Appendix at H1)

49 U.S.C. Section 1482 (Appendix at I1)

49 U.S.C. Section 1485 (Appendix at J1)

14 C.F.R. Section 302.204 (Appendix at K1)

14 C.F.R. Section 302.207 (Appendix at L1)

14 C.F.R. Section 302.208 (Appendix at M1)

STATEMENT

A. The Facts

A.V. Costantini (Dr. Costantini) entered the travel agency business in 1963 and during the ensuing decade opened many branch offices including the establishment of branches in the Montgomery Ward Stores.

In order to be able to provide airline tickets to clients, each travel office required separate approval by the Air Transport Association of America (ATC) and by the International Air Transport Association (IATA). ATC and IATA required certification that the ownership of the branch office was the same as that of the home office.

Pursuant to the provisions of Civil Aeronautics Board Orders No. E-14012 and No. E-16459, ATC and IATA are required to record and give notice to applicants the reasons for not approving branch offices.

The expansion into the 475 nationwide Montgomery Ward Stores was thwarted by ATC claiming that office managers lacked experience. IATA failed to provide any reasons what-so-ever as to why it was refusing to approve additional branch offices in the various Montgomery Ward Stores. As a result of ATC and IATA refusal to approve these new offices, the license agreement with Montgomery Wards Stores was lost.

The conflict was aggravated when a Trans World Airline (TWA) representative informed one of Dr. Costantini's branch office managers that ATC was never going to approve any of the newly opened offices. As TWA's legally appointed agent, Dr. Costantini wrote to the TWA Chairman of the the Board demanding that TWA provide any information which it had in its possession upon which TWA knew that ATC would never approve any of the Montgomery Ward Store offices. TWA's response was that ATC was

not approving future offices because Dr. Costantini had been charged with selling illegal airline tickets and that the new offices lacked experienced managers. Dr. Costantini has never sold illegal airline tickets nor has he ever been charged for having done so.

As TWA's agent, Dr. Costantini relied upon TWA's representation that any information that TWA had in its possession had been released to him. There was no rational reason to suspect that TWA, as Dr. Costantini's principal, would falsify its representations being made to him. Even if suspicion were to have existed, it would have been dispelled by the fact that documents obtained from ATC, as a part of discovery proceedures relevant to ATC's refisal to approve the Montgomery Ward Store locations, failed to include the key documents upon which this dispute is based.

What TWA, ATC and IATA had failed to inform Dr. Costantini was that the TWA had written to the Civil Aeronautics Board, to ATC and to IATA that Dr. Costantini was not the true owner of his branch offices and that these offices were actually improper franchises which were owned by the branch office manager:

> "the fact that he has been requesting approval of his agency locations as branches..but is reported to be selling the branches as franchises and a percentage of the gross profit."

Dr. Costantini has never sold his branch offices as franchises and the ownership of his branches was at all times the same as that of the parent office.

ATC made the same falsification before the Antitrust Division of the United States Department of Justice thereby terminating its investigation into Dr. Costantini's complaint that ATC's activities constitut-

ed antitrust violations.

As the result of TWA's false repre-entations, Dr. Costantini was effectively prevented from expanding into the 475 Montgomery Ward Stores nationwide. The fact that TWA is also a direct competitor with Dr. Costantini in the sale of air transportation, package tours and related travel services cannot be overlooked. The fact that TWA's false representation to the Civil Aeronautics Board, which was subsequently passed on to the Department of Justice, played a key role in thwarting governmental investigation of ATC and TWA cannot be overlooked. The fact that TWA violated the law by filing false information before the Civil Aeronautics Board cannot be overlooked. The fact that ATC and IATA violated the Civil Aeronautics Board's orders in not providing Dr. Costantini with the true resons why the Montgomery Ward Store locations were not

being approved cannot be overlooked.

If Dr. Costantini had not exercised his rights under the Freedom of Information Act, none of the above-described fraud would have ever been discovered.

B. Proceedings Below

Following the discovery of the existence of fraudulently concealed falsifications having been made by TWA, ATC and IATA, Dr. Costantini excercised his right under the provisions of 49 U.S.C. Section 1482 and filed three complaints before the Civil Aeronautics Board.

In Docket 37917 (Costantini v. TWA), petitioner alleged and documented that TWA had violated the Federal Aviation Act by placing false information before the Civil Aeronautics Board.

In Docket 38211 (Costantini v. ATC), ATC), petitioner alleged and documented that ATC had violated CAB Order No. E-

14012, issued June 10, 1959.

In Docket 38233, (costantini v. IATA), petitioner alleged and documented that IATA had violated CAB Order No. E-16459, issued March 1, 1961.

TWA responded to the complaint by stating that it was without knowledge to nearly all of the allegations and that it denied it had made secretive and false representations and statements.

ATC and IATA defaulted by failing to file any response to petitioner's complaints against them.

On June 4, 1980. the Director of the Civil Aeronautics Board's Bureau of Consumer Protection, acting under delegated authority, issued Order 80-6-21 dismissing, without conducting an investigation, all of petitioner's complaints against TWA, ATC and IATA. (Appendix at D1)

On June 30, 1980, petitioner filed his request for Civil Aeronautics Board review

of Order 80-6-21. On November 3, 1980, without a notice of hearing and without a hearing, said Board adopted Order 80-11-10 dismissing all of petitioner's complaints against TWA, ATC and IATA (Appendix at C1).

On December 29, 1980, petitioner petitioned the United States Court of Appeals for the Ninth Circuit for review of the Civil Aeronautics Board's orders. On April 7, 1982, the Court of Appeals affirmed the order of the Civil Aeronautics Board (Appendix at A1).

On April 20, 1982, petitioner requested a rehearing before the Court of Appeals. On May 25, 1982, the petition for rehearing was denied (Appendix at B1).

REASONS FOR GRANTING WRIT

I THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THE ATLANTIC COAST LINE CASE IN THIS COURT, THAT AGENCY ORDERS MUST BE OBEYED

In the proceedings below, the mandate of 49 U.S.C. Section 1485(e) was ignored:

> "It shall be the duty of every person subject to this Act... to observe and comply with any order...issued by...the Board under this Act affecting such person so long as the same shall remain in effect."

The decision below is in conflict with the applicable decision of this Court. Atlantic Coast Line R. Co. v. Florida, 295 U.S. 301, reh den 295 U.S. 769. This court held that valid administrative orders must be obeyed by all parties governed thereby.

The facts are that ATC violated CAB Order No. E-14012 and IATA violated CAB Order E-16459 when they failed to provide petitioner with the reasons why they would

not approve his Montgomery Ward locations. The proceedings below have entirely ignored these facts with the result being that ATC and IATA have not only violated these CAB orders but now enjoy both agency and judicial approval of their illegal acts.

II THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES SET OUT IN THE SIERRA CLUB CASE. AND OTHER CASES IN THIS COURT, THAT PETITIONER HAS A RIGHT TO ADMINISTRATIVE ACTION AS A REPESENTATIVE OF THE PUBLIC INTEREST

The proceedings below ignored the public interest standard which is applicable in this case and completely ignored petitioner's allegations and supporting argument that this case involved the public interest.

It is settled law that an agency's primary purpose is to protect the public interest. United States v. Abilene & S.R. Co., 265 U.S. 274.

In Pan Am Airways v. United States, 371 U.S. 296, this Court defined public interest in the context of the particular regulatory responsibilities as clearly stated in 49 U.S.C. Section 1302:

> "..the Board shall consider the following, among other things, as being in the public interest.. (c) the promotion of adequate, economical, and effecient service by air carriers at reasonable charges, without undue discriminations, undue preferences or advantages, or unfair or destructive practices;" 1/

There can be no question that the actions of TWA, ATC and IATA constituted unfair and destructive practices when the result was the destruction of petitioner's plan to establish 475 travel agency locations in the Montgomery Ward Stores. The nature of the proceedings below results in undue preference and advantage for TWA, ATC and IATA at the expense of petitioner.

1/ 49 U.S.C. 1302(c) has since been replaced by 1302(a)(3) but the new language does not appear to alter the public interest standard.

The reviewing court's decision is in conflict with the appellate court's decision in Civil Aeronautics Board v. Carefree Travel, Inc. 513 F.2d 375, where the Board's position that public interest predominates on the side of enforcing the law was upheld. In the instant case the proceedings below have the effect of protecting criminal activity.

The decision below is also in conflict with applicable decisions of this Court. When a person establishes that he has a standing to seek judicial review of the action because of particularized injury to him, he may argue the public interest as a "representative of the public interest" as a "private attorney general", so that he may contest not only the action which injures him but the entire complex of actions of which his injury-inducing action is a part. Sierra Club v. Morton, 405 U.S. 727; Scripps How-

ard Radio v. FCC, 316 U.S. 4; FCC v. Sanders Brothers Radio Station, 309 U.S. 470.

III AN IMPORTANT QUESTION OF FEDERAL LAW HAS DEEN DECIDED BY A FEDERAL COURT OF APPEALS WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT

The fact is that TWA filed false statements before the Civil Aeronautics Board regarding the petitioner. 49 U.S.C. Section 1472(e) provides that no carrier:

> "shall knowingly and willfully file any false report...or memorandum..."

The proceedings below have the effect of making legal what is by statute illegal. An important question of federal law has been decided by the Court of Appeals; a question which has not been, but should be decided by this Court.

IV THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THE VITARELLI CASE, AND OTHER CASES IN THIS COURT, THAT AGENCY ACTION MUST CONFORM TO THE RULES

To be valid, the action of an agency must conform to the rules, particularly those designed to provide procedural safeguards for fundamental rights. Vitarelli v. Seaton, 359 U.S. 535; Service v. Dulles, 354 U.S. 363: Bridges v. Wixon, 326 U.S. 135. The proceedings before the Civil Aeronautics Board were not conducted in accordance with the Board's Rules of Practice. 14 C.F.R. 302.207(b) provides:

> "Allegations of fact not denied or contraverted shall be deemed admitted." 2/

The failure of ATC and IATA to file an answer denying or contraverting the allegations that they had violated Board orders admits petitioner's allegations. The proceedings below ignore this reality.

2/ 14 C.F.R. 302.207(b) is applicable to the conduct of Third-Party Complaints as set forth in 14 C.F.R. 302.204(b)

14 C.F.R. 302.208 further provides:

> "Failure of a respondent to file and serve an answer...shall be deemed to authorize the Board, in its discretion, to find the facts alleged in the petition to be true and to enter such order as may be appropriate without notice or hearing, or, in its discretion, to proceed to take proof, without notice, of the allegations or charges set forth in the complaint.."

The Board is not authorized to dismiss a Third Party Complaint when default has occured.

Clearly, the agency action was without observation of procedure required by law and, as provided in 5 U.S.C. Section 706 (2)(D), the reviewing court shall hold unlawful and set aside such agency action.

V THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THIS SAME CIRCUIT, THAT AN EVIDENTIARY HEARING IS REQUIRED AS A BASIS FOR DETERMINING ADJUDICATORY FACTS

Petitioner has alleged and documented that TWA has violated the Federal Aviation Act by placing false information before the Civil Aeronautics Board; that ATC and IATA have violated the Federal Aviation Act by violating Board orders. Based upon these facts, an investigation and hearing are mandated by 49 U.S.C. Section 1482:

> "If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the...Board to investigate the matters complained of."

The proceedings below have entirely ignored the provisions of 49 U.S.C. Section 1482. Petitioner's complaints were filed under the provisions of 49 U.S.C. Section 1482 and none of the proceedings below have have appropriately addressed

this reality. In fact, the administrative and judicial determinations below were made on the basis of complaints filed under Section 411 of the Federal Aviation Act, 49 U.S.C. Section 1381. Petitioner made this more than clear when he amended his original complaints and continued to stress this point throughout the proceedings without benefit of response either at the agency level or the judicial level including his request for a rehearing. The decisions below have been made as if 49 U.S.C. Section 1482 doesn't exist. But it does exist and petitioner claims his right to have filed his complaints pursuant to the provisions thereof.

In Marshall v. Sawyer, 365 F.2d 105, the Ninth Circuit stated:

> "Procedural due process requires that when, as a premise for administrative action, an agency of government makes a determination of adjudicatory facts, one who has a sufficient interest or right at stake shall be afforded an evidentiary hearing..."

The reviewing court also ignored the mandate of the Administrative Procedure Act, 5 U.S.C. Section 554(c)(2) which states:

> "The agency shall give all interested parties opportunity for-
>
> (2) to the extent that the parties are unable to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title"

VI THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN RALADAM CASE, AND OTHER CASES IN THIS COURT, THAT AN ORDER ISSUED WITHOUT SUPPORT IN EVIDENCE IS BEYOND THE POWER AND JURISDICTION OF AGENCIES

The record in the case below is unique in that the entire evidenciary record consists only of petitioner's documentary evidence submitted as proof of the allegations against TWA, ATC and IATA. Those documents constitute the only findings of fact which the record below contains and therefore are the only findings of fact

upon which the Civil Aeronautics Board's order should have been based.

49 U.S.C. Section 1485(f) mandates that the Civil Aeronautics Board shall set forth the findings of fact upon which its order is based. An order issued without support in evidence is beyond the power and jurisdiction of agencies. Federal Trade Commission v. Ralmadam, 283 U.S. 643; United States v. Abilene & S.R. Co., 265 U.S. 274; Interstate Commerce Commission v. Louisville & N.R. Co. 227 U.S. 88.

Ignoring petitioner's evidence violated the rudiments of fair play. West Ohio Gas Co. v. Public Utilities Commission, 294 U.S. 79.

VII THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN OVERTON PARK CASE, THAT THE FACTS ARE SUBJECT TO TRIAL DE NOVO WHEN AGENCY ACTION IS UNWARRENTED BY THE FACTS

5 U.S.C. Section 706(2)(E) mandates that the facts are subject to trial de

action is unwarranted by the facts. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402.

The only facts in the record below are the facts that TWA placed false statements before the Civil Aeronautics Board and that ATC and IATA have violated Civil Aeronautics Board orders.

The proceedings below have ignored the petitioner's statutory right to have the facts subject to a trial de novo by the United States Court of Appeals.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

A.V. Costantini
In Propria Persona
565 John Daly Blvd
Daly City, Ca 94015
(415) 991-4907

August 20, 1982